

EXHIBIT 1

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6
7 UNITED STATES DISTRICT COURT
8 FOR THE WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 CHRISTINE DAVID and RODNEY CLURE,
11 individually and on behalf of all others similarly
12 situated,

13 Plaintiffs,

14 v.

15 BANKERS LIFE AND CASUALTY
16 COMPANY, a foreign corporation,

17 Defendant.

Case No.

DECLARATION OF DANIEL L.
THIEME IN SUPPORT OF
DEFENDANT'S NOTICE OF
REMOVAL

I, DANIEL L. THIEME, do hereby declare as follows:

1. I am an attorney with Littler Mendelson, P.C. I am the lead counsel in this case
2. for Defendant Bankers Life and Casualty Company ("Bankers" or "Defendant"). I am
3. submitting this declaration in support of Defendant's Notice of Removal. I am over the age of
4. eighteen, have personal knowledge of the facts stated in this declaration, and am competent to
5. testify thereto.

2. Attached hereto as Exhibit A is a true and correct copy of the First Amended
3. Class Action Complaint in this action.

3. On July 24, 2013, I took the deposition in this case of named Plaintiff Christine
4. David. Ms. David testified that she would be teaching English in China for two years starting in
5.

1 August of 2013, but also would be returning to Seattle from time to time. A true and correct
2 copy of page 34 of her deposition is attached hereto as Exhibit B.

3 4. The King County Superior Court issued Findings of Fact, Conclusions of Law,
4 and Order Regarding Plaintiffs' Motion for Class Certification in this action on January 22, 2014
5 ("Findings of Fact"). A true and correct copy of the Findings of Fact is attached hereto as
6 Exhibit C. In Conclusion of Law No. 6 on page 6, the Court found that there are more than
7 1,000 Agents in the class.

8 5. Bankers' Interrogatory No. 2 in its third set of discovery in this action asked the
9 Plaintiffs to "[s]tate the amount of damages sought by the Class in this case, and describe in
10 detail how the amount is calculated." Plaintiff first answered this Interrogatory on March 17,
11 2014, indicating that plaintiff was in the process of calculating the damages. On May 19, 2014,
12 Plaintiffs supplemented their answer to Interrogatory No. 2, stating that the total class damages
13 for the time period from June 16, 2008 through December 31, 2011 are estimated at \$16,928,996.
14 A true and correct copy of Plaintiffs' May 19, 2014 supplemental response (which also includes
15 the Interrogatory and Plaintiff's first response) is attached hereto as Exhibit D.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22nd day of May 2014, at Seattle, Washington.

s/ Daniel L. Thieme
DANIEL L. THIEME

CERTIFICATE OF SERVICE

I am a resident of the State of Washington, over the age of eighteen years, and not a party to the within action. My business address is One Union Square, 600 University Street, Suite 3200, Seattle, Washington 98101-3122. I certify that on May 22, 2014, I filed the foregoing document with the Clerk of the Court using the CM/ECF System.

I further certify that I served a true copy of the foregoing document in the manner indicated on the person(s) set forth below:

- by emailing a true copy of the same to the email addresses of the person(s) set forth below.
- by placing a true copy of the same for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Seattle, Washington addressed as set forth below.
- by causing a copy of the same to be hand-delivered to the person(s) at the address(es) set forth below.

Martin S. Garfinkel, WSBA # 20714

garfinkel@sgb-law.com

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Lindsay L. Hahm, WSBA #37141

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SCHROETER GOLDMARK & BENDER

819 Third Avenue, Suite 500

Seattle, Washington 98104

Tel: (206) 622-8000

Fax: (206) 682-2305

J. Am. Chem. Soc.

ATTORNEYS FOR PLAINTIFF

I declare under the penalty of perjury under the laws of the State of Washington that the above is true and correct. Executed on May 22, 2014, at Seattle, Washington.

s/Sally Swearerger
sswearinger@littler.com

EXHIBIT A

The Honorable Theresa Doyle
Trial Date: June 16, 2014

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CHRISTINE DAVID and RODNEY CLURE, individually and on behalf of all others similarly situated.

No. 11-2-21154-1 SEA

**FIRST AMENDED CLASS ACTION
COMPLAINT**

V.

BANKERS LIFE AND CASUALTY COMPANY, a foreign corporation; and ALBERT HAWKS, an individual.

Defendants.

I. INTRODUCTORY STATEMENT

This is a class action brought under the Washington Minimum Wage Act (“MWA”), Ch. 49.46 RCW, on behalf of all persons currently or formerly employed as Agents by Defendant Bankers Life and Casualty Company in the State of Washington at any time from three years prior to the filing of this Complaint to the present and hereafter. Plaintiffs allege that they and other Agents were misclassified as independent contractors by Defendants and were thereby denied proper compensation, including minimum wages and overtime pay, required under the MWA.

II. JURISDICTION AND VENUE

1. Jurisdiction and venue are proper in this Court under RCW 4.12.020 as all or some of the acts and omissions giving rise to this case took place in King County, Washington.

III. PARTIES

2. Plaintiff Christine David is a resident of Seattle, Washington and was formerly employed by Bankers Life and Casualty Company as an Agent in Washington State.

3. Plaintiff Rodney Clure is a resident of Bellevue, Washington and was formerly employed by Bankers Life and Casualty Company as an Agent in Washington State.

4. Defendant Bankers Life and Casualty Company ("Bankers") is a foreign corporation with a principal place of business in Chicago, Illinois. At all times material hereto, Bankers conducted business in King County and the State of Washington.

5. Defendant Albert Hawks is a resident of Washington and, at all times material hereto, is and was the branch manager and regional manager for Bankers in Washington State.

6. Bankers and Albert Hawks are and were employers within the meaning of the MWA.

IV. FACTUAL ALLEGATIONS

7. Plaintiff and other persons hired by Defendants as Agents were engaged to sell annuities and other Bankers insurance products in Washington State. Bankers' insurance products are primarily targeted at senior citizens.

1 8. Defendants classified Plaintiffs and other Agents in Washington State as
 2 independent contractors rather than as employees.

3 9. Plaintiffs and other Agents were paid on a commission basis.

4 10. The Agents were economically dependent upon Bankers in all critical
 5 respects. Bankers controlled the manner and means of the work performed by the Agents;
 6 the Agents could not increase their profits by their managerial skill; any investment made by
 7 Agents in equipment or material was minimal; Bankers did not require any experience in the
 8 industry or as a salesperson and the level of skill required for the work was consistent with an
 9 employment relationship; Agents were given reason to expect a longstanding relationship
 10 with Bankers Life; and the work of the Agents -- selling of insurance products -- was integral
 11 to the business model of Bankers Life.

12 11. Plaintiff and other Agents routinely worked more than 40 hours per week
 13 during the three years prior to the filing of this complaint, but were never paid time and a half
 14 overtime wages by Defendants for hours worked in excess of 40 hours per week.

15 12. There were workweeks during the three years prior to the filing of this
 16 complaint when the compensation paid to Plaintiffs and other Agents was less than the
 17 minimum wage per hour set by the Washington Department of Labor and Industries under
 18 the MWA.

19 13. Defendants' failure to pay overtime compensation or, in some weeks,
 20 minimum wages was due to Defendants' misclassification of Plaintiffs and other Agents as
 21 independent contractors, when, in fact, they were statutory employees.

22 V. CLASS ALLEGATIONS

23 14. Plaintiffs file this lawsuit pursuant to the MWA and CR 23 on behalf of
 24 themselves and similarly situated individuals employed by Defendants. The class of

1 potential plaintiffs encompassed by this claim includes:

2 All persons hired by Bankers who worked as Agents (or in similar job
3 classifications) during the three years prior to the filing of this lawsuit
and thereafter whom Bankers classified as independent contractors.

4 15. The action is properly maintainable under CR 23(a), (b)(2) and (b)(3).

5 16. The class described above is sufficiently numerous such that joinder of all of
6 them is impractical, as required by CR 23(a)(1).

7 17. Pursuant to CR 23(a)(2), there are questions of law and fact common to the
8 class, including, but not limited to: whether class members were misclassified as independent
9 contractors by Defendants; whether class members are subject to the overtime requirements
10 of the MWA; whether Defendants failed to pay class members one and one-half times their
11 regular rate of pay for overtime work; and whether Defendants failed to pay class members
12 minimum wages in any workweeks.

13 18. Pursuant to CR 23(a)(3), Plaintiffs' wage and hour claims are typical of the
14 claims of all class members and of Defendants' anticipated affirmative defenses thereto.

15 19. Plaintiffs will fairly and adequately protect the interests of the class as
16 required by CR 23(a)(4).

17 20. Pursuant to CR 23(b)(2), Defendants have acted on grounds generally
18 applicable to the class members by uniformly misclassifying them as independent
19 contractors, making declaratory relief appropriate with respect to the class as a whole.

20 21. Pursuant to CR 23(b)(3), class certification is appropriate here because
21 questions of law or fact common to members of the class predominate over any questions
22 affecting only individual members and because a class action is superior to other available
23 methods for the fair and efficient adjudication of the controversy.

VI. CLAIMS FOR RELIEF

A. First Claim - Failure To Pay Overtime Wages In Violation Of the MWA

22. Plaintiffs repeat and reallege the prior allegations of this complaint.

23. Defendants' failure to pay Plaintiffs and the class members one and one-half times their regular rate of pay for hours worked in excess of 40 in their workweeks constitutes a violation of RCW 49.46.130.

24. As a result of Defendants' acts and omissions, Plaintiffs and the class members have been damaged in amounts as will be proven at trial.

B. Second Claim – Failure To Pay Minimum Wages In Violation Of The MWA

25. Plaintiffs repeat and reallege the prior allegations of this complaint.

26. Defendants' failure to pay Plaintiffs and the class members at least the minimum wage per hour for each hour worked in their workweeks constitutes a violation of RCW 49.46.020.

27. As a result of Defendants' acts and omissions, Plaintiffs and the class members have been damaged in amounts as will be proven at trial.

VII. PRAYER FOR RELIEF

28. The total recovery alleged by Plaintiffs in this case, including reasonable attorneys' fees but excluding interest and costs, is less than \$75,000 for the named Plaintiffs individually and \$5,000,000 in the aggregate for Plaintiffs and the class as a whole.

29. Wherefore, Plaintiffs, individually and on behalf of the similarly situated persons, pray for relief as follows:

a. Certification of this case as a class action pursuant to CR 23 and the MWA;

- b. Damages for lost wages in amounts to be proven at trial;
- c. Attorneys' fees and costs pursuant to RCW 49.46.090 and RCW 49.48.030;
- d. Prejudgment interest; and
- e. Such other and further relief as the Court deems just and proper.

DATED this 28th day of August, 2013.

SCHROETER, GOLDMARK & BENDER

Adam J. Berger, WSBA #20714
Martin S. Garfinkel, WSBA #20787
Lindsay L. Halm, WSBA #37141
Counsel for Plaintiffs

1 **DECLARATION OF SERVICE**

2 I, Sheila Cronan, a resident of the County of Kitsap, declare under penalty of perjury
3 under the laws of the State of Washington that on August 28, 2013, I caused to be emailed
4 and placed in the U.S. Mail, first class, postage prepaid, a true and correct copy of this
5 document addressed to counsel of record, as follows:

6
7 Daniel L. Thieme
8 Ryan P. Hammond
9 Rachelle L. Wills
10 Littler Mendelson PC
11 600 University Street, Suite 3200
12 Seattle, WA 98101

13
14 Tyler L. Farmer
15 Calfo Harrigan Leyh & Eakes LLP
16 999 Third Avenue, Suite 4400
17 Seattle, WA 98104

18
19 DATED at Seattle, Washington this 28th day of August, 2013.

20
21
22
23
24
25
26



SHEILA CRONAN
Paralegal

EXHIBIT B

Christine Marie David

July 24, 2013

Page 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CHRISTINE DAVID, individually)
and on behalf of all others)
similarly situated,)
)
 Plaintiff,)
)
 vs.) No. 11-2-21154-1 SEA
)
BANKERS LIFE AND CASUALTY)
COMPANY, a foreign)
corporation; and ALBERT)
HAWKS, an individual,)
)
 Defendants.)

VIDEOTAPED DEPOSITION UPON ORAL EXAMINATION
OF
CHRISTINE MARIE DAVID

Littler Mendelson, P.C.
600 University Street, Suite 3200
Seattle, WA 98101-3122

DATE: July 24, 2013

REPORTED BY: Jill L. Cheeseman, RPR CCR 2404

Christine Marie David

July 24, 2013

Page 2

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A P P E A R A N C E S

2

FOR PLAINTIFF:

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8

ALSO PRESENT:

9

LOREN E. DEAN
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11201 S.E. 8th Street, Suite 140
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10

VIDEOGRAPHER:

11

BILL TAKOS
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courtreporters@seadep.com

Christine Marie David

July 24, 2013

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2	WITNESS	MR. THIEME	MR. FARMER
3	CHRISTINE MARIE	6	186
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E X H I B I T S

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12	6 Agent License, Appointment Certificate, Insurance Producer License (DAVID 000486 - 487)	45
13	7 Credit Card Authorization dated August 31, 2009 (Confidential BL 01269)	50
14	8 Hardware and Software Statement dated August 31, 2009 (Confidential BL 00038)	51
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16	* 10 Form 1040 for 2009 (Confidential DAVID 000531 - 545)	179
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Christine Marie David

July 24, 2013

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2	DESCRIPTION	PAGE
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5	* Exhibits 10, 11 and 12 with sealed portion of transcript, pursuant to protective order.	
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SEATTLE DEPOSITION REPORTERS, LLC

www.seadep.com 206.622.6661 * 800.657.1110 FAX: 206.622.6236

Christine Marie David

July 24, 2013

Page 5

1 Seattle, Washington, Wednesday, July 24, 2013

2 9:03 a.m.

3

5 deposition of Christine David. This is Tape 1, Volume
6 1, in the matter of David versus Bankers Life in the
7 Superior Court of State of Washington in and for King
8 County, Case Number 11-2-21154-1 SEA.

9 Today's date is Wednesday, July 24, 2013.

10 The time on the video monitor is 9:03 a.m. The
11 videographer today is Bill Takos, video specialist for
12 Seattle Deposition Reporters located in Seattle,
13 Washington. The phone number is 206-622-6661. The
14 court reporter is Jill Cheeseman, also from Seattle
15 Deposition Reporters.

16 Today's deposition is taken on behalf of
17 defendant, taking place at 600 University Street, Suite
18 3200, Seattle, Washington.

19 Counsel and all present, please introduce
20 yourselves and whom you represent.

21 MR. BERGER: Adam Berger from Schroeter
22 Goldmark and Bender on behalf of plaintiff.

23 MR. THIEME: Dan Thieme, Littler Mendelson,
24 on behalf of defendant.

25 MR. HAMMOND: Ryan Hammond, Littler

Christine Marie David

July 24, 2013

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1 on to graduate school and completed that just recently.

2 Q. Congratulations.

3 A. Thank you.

4 Q. What was your undergraduate degree in?

5 A. Political science.

6 Q. And your graduate degree?

7 A. In teaching English as a second language.

8 Q. And I believe I understand that something is
taking you away from this country for a period of time;
9 is that right?

10 A. The teaching English as a second language.

11 Q. Where overseas are you going to teach
12 English?

13 A. I'll be teaching at Shantou University in
14 Shantou, Guangdong Province, China.

15 Q. When does that begin?

16 A. That begins August 19.

17 Q. And how long are you currently scheduled to
18 be there teaching English?

19 A. I have a two year contract.

20 Q. Life is uncertain of course; but as you sit
21 here today, do you expect to be over in China for that
22 two year period?

23 A. I expect to be in China for that two year
24 period. I expect to be back in the Seattle area in

Christine Marie David

July 24, 2013

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1 C E R T I F I C A T E

2 STATE OF WASHINGTON)

3) ss.

3 COUNTY OF SNOHOMISH)

4

5 I, the undersigned Registered Professional
6 Reporter and Washington Certified Court Reporter,
7 hereby certify that the foregoing videotaped deposition
8 upon oral examination of CHRISTINE MARIE DAVID was
9 taken stenographically before me on July 24, 2013, and
10 transcribed under my direction;

11

12 That the witness was duly sworn by me
13 pursuant to RCW 5.28.010 to testify truthfully; that
14 the transcript of the videotaped deposition is a full,
15 true and correct transcript to the best of my ability;
16 that I am neither attorney for nor a relative or
17 employee of any of the parties to the action or any
18 attorney or counsel employed by the parties hereto nor
19 financially interested in its outcome.

20

21 IN WITNESS WHEREOF, I have hereunto set my
22 hand this 2nd day of August 2013.

23

24 \S\JILL L. CHEESEMAN

25

NCRA Registered Professional Reporter
Washington Certified Court Reporter No. 2404
License expires February 23, 2014.

EXHIBIT C



Honorable Theresa Doyle
Trial Date: June 16, 2014

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CHRISTINE DAVID and RODNEY
CLURE, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

BANKERS LIFE AND CASUALTY
COMPANY, a foreign corporation; and
ALBERT HAWKS, an individual,

Defendants.

No. 11-2-21154-1 SEA

[PROPOSED] FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER REGARDING PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION

Pursuant to the Court's Memorandum Decision of December 2, 2013, plaintiffs
submit the following proposed findings and conclusions regarding the CR 23 factors in this
case.¹

¹ Citations in the following findings and conclusions are to the Declarations of Rod Clure, Christine David, Anthony Gaynes, Gary Glassburn, David Hendry, Maureen Hoff, Stephanie Huggins, Shawn Layton, Christopher Mitchell, Richard Keppler, Bill Blankenship, Erina Bowie, Nicolas Crowner, Lillian Neil, Daniel Graf, Jacquelynn McCormick, Loren Boles, Stephen Cummings, and George Francisco, all of whom are former agents with Bankers Life. Mr. Cummings and Mr. Layton also filed Second Declarations, which are cited. Exhibit citations are to the exhibits appended to the first and second Declarations of Adam J. Berger. Also cited are the declarations of Bankers managers and agents Charles "Bill" Berryhill, Rich Carter, Lawrence "Loren" Dean, Kip Stallcop, Danielle Fawaz, Jules Kendrick, Sara Dinoto, Alina Labizon, Carol Stringer Adado, Jonathan Gans and D.J. Fox submitted by Bankers.

[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER REGARDING PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION - 1

ORIGINAL

SCHROETER GOLDMARK & BENDER
810 Third Avenue • Suite 500 • Seattle, WA 98104
Phone (206) 622-8000 • Fax (206) 682-2305

FINDINGS OF FACT

1. Plaintiffs Christine David and Rodney Clure seek certification pursuant to Civil Rule 23(a) and (b)(3) of a class of agents who sold insurance policies in the State of Washington for defendant Bankers Life and Casualty Company (“Bankers”) between June 16, 2008 and December 2, 2013, the date of the Court’s Memorandum Decision Granting Plaintiffs’ Motion for Class Certification. These agents worked out of two branch offices (Bellevue and Tacoma/University Place) and four satellite offices (Bellingham, Walla Walla, Spokane, and Vancouver). Co-defendant Albert Hawks was the ~~regional and/or branch sales manager for the Bellevue office and regional manager~~ manager for three of ~~these~~ offices (Bellevue, Bellingham, and Walla Walla) for ~~part of the proposed class period, at least June 2008 to July 2011.~~

2. Bankers labeled plaintiffs and the putative class of agents "independent contractors." Plaintiffs allege they and the other agents were employees under the Washington Minimum Wage Act, RCW 49.46, *et seq.* ("MWA"), and were denied its protections of minimum wage and overtime pay by virtue of their classification as independent contractors.

3. The "class list" produced by Bankers to plaintiffs in March 2013 shows that approximately 1,156 agents had worked for the company in Washington between June 16, 2008 and the date of that list. Berger Decl. ¶6.

4. Plaintiffs have proffered substantial evidence that Bankers followed common policies and practices which applied to the employment classification and working conditions of all agents in Washington during the proposed class period.

5. All agents signed the same contract with Bankers, and all agents were classified as independent contractors in accordance with that contract and company policy. Berger Decl.

1 Ex. 17 (Agent Contract). All agents were paid under the same commission schedule, which was
 2 subject to unilateral change by Bankers. Berger Decl. Ex. 15 (Commission Schedule).

3 6. When an agent left Bankers Life, the policyholders served by that agent remained
 4 the client of Bankers, not of the agent. In other words, agents did not have their own "book of
 5 business."²

6 7. The proposed class members were "captive" agents.³ Bankers controlled the
 7 products that agents could sell and prohibited agents from selling the products of competitor
 8 insurers.⁴

9 8. Agents worked out of Bankers' offices or out of their home offices; there is no
 10 evidence in the record that any leased commercial space. The form of business card proscribed
 11 by Bankers also required agents to list the Bankers office as their business address. Berger Decl.
 12 Ex. 39 (Field Compliance Alert), at BL 2758.

13 9. Bankers' offices had work and meeting schedules that agents were expected to
 14 follow, and agents could be disciplined for failing to comply.⁵

15 10. Bankers required all agents to go through the same New Agent Success and
 16 Winners Edge training programs.⁶

21 ² Layton Decl. ¶15; Mitchell Decl. ¶10; Cummings Decl. ¶10; Berger Decl. Ex. 44 ("Conservation Procedure"), at
 22 BL 541 (describing that Agent does not "own" policyholder household, and servicing can be reassigned by Sales
 23 Manager); Berger Decl. Ex. 45 (Complaint in lawsuit filed by Bankers against former agents for, *inter alia*,
 soliciting customers away from the company).

24 ³ Cummings Decl. ¶15; David Decl. ¶8; McCormick Decl. ¶3; Berger Decl. Ex. 42.

25 ⁴ Second Layton Decl. ¶¶3-8; Second Cummings Decl. ¶¶3-6.

26 ⁵ Berger Decl. Ex. 3 (Office Schedules), Ex. 16 ("Seattle Steps for Success"); Blankenship Decl. ¶¶5-6; Layton Decl.
 ¶3; Keppler Decl. ¶2; Neil Decl. ¶7; Boles Decl. ¶4; McCormick Decl. ¶6; Mitchell Decl., ¶¶ 2,6; Francisco Decl.
 ¶4; Crownier Decl. ¶6; Clure Decl. ¶¶ 8, 10; Hendry Decl. ¶7; Gaynes Decl. ¶9; Bowie Decl. ¶5. See also Carter
 Decl. ¶7 (Bankers declarant, acknowledging written schedule agents were encouraged to follow); Dean Decl.
 ¶8 (same); Stallcop Decl. ¶9 (same).

1 11. Bankers controlled distribution of sales “leads,”⁷ provided standard telephone
 2 scripts and required approval of any different scripts,⁸ imposed restrictions on and required
 3 corporate approval of other advertising and marketing, including presentation materials and use
 4 of social media,⁹ and expected completion of certain forms, including a standardized “Fact
 5 Finder” during and following sales calls.¹⁰

6 12. Bankers also set targets for agents regarding the number of prospecting calls and
 7 in-person appointments they should make,¹¹ and Bankers’ managers monitored agents’
 8 compliance with these expectations.¹²

9 13. Bankers expected agents to keep in daily contact with their managers. Berger
 10 Decl. Ex. 16 (“Seattle Steps for Success”).

11 14. Bankers also warned agents when they failed to return client calls within 24
 12 hours,¹³ and expected agents to deliver policies in person to customers within a set period of time
 13 after the policies were issued.¹⁴

14 ⁶ Berger Decl. Ex. 4 (“Welcome New Agent” letter), Ex. 7 (Bankers Life Branch Sales Manager (“BSM”) Manual),
 at BL 981-82; Glassburn Decl. ¶4; Mitchell Decl. ¶4; Clure Decl. ¶5; David Decl. ¶¶6, 11; Layton Decl. ¶8
 (describing mandatory new agent training schedule).

15 ⁷ Cummings Decl. ¶8; David Decl. ¶10; Boles Decl. ¶6; Francisco Decl. ¶7; Glassburn Decl. ¶3; Layton Decl.
 ¶10,11; Gaynes Decl. ¶6.

16 ⁸ Cummings Decl. ¶4; McCormick Decl. ¶5; Berryhill Decl. ¶ 15; Carter Decl. ¶ 18; Berger Decl. Ex. 7 (BSM
 Manual), at BL 983, Ex. 23(Telephone Prospecting Training), at BL 1872 (instructing Agents, “do not stray from
 the script in any way”); Second Berger Decl. ¶¶4-5 (submitting and quoting training video).

17 ⁹ Bowie Decl. ¶6; Crowner Decl. ¶8; Hoff Decl. ¶ 8; *see also* Berger Decl. Ex. 7 (BSM Manual), at BL 982-86,
 Ex. 17 (Agent Contract), at BL 10, Ex. 25 (Agent Information and Procedure (“Agent”) Manual), at BL 710,
 Ex. 33 (Telemarketing Guidelines), Ex. 34 (Field Compliance Alert), Ex. 35 (Field Compliance Alert), Ex. 36
 (Agent Compliance Guidelines) (prohibiting websites and restricting use of social media).

18 ¹⁰ Berger Decl. Ex. 7 (BSM Manual), at BL 985-86, Ex. 20 (New Agent Success Training – Fact Finding), at
 BL 1775.

19 ¹¹ Berger Decl. Ex. 12 (New Agent Success Workshop - Prospecting), Ex. 16 (“Seattle Steps for Success”); Keppler
 Decl. ¶5; Layton Decl. ¶8; David Decl. ¶3; Cummins Decl. ¶¶4, 6.

20 ¹² Boles Decl. ¶5; Cummings Decl. ¶6, Neil Decl. ¶7; Layton Decl. ¶8; David Decl. ¶3.

21 ¹³ Second Berger Decl. ¶6 & Ex. 4 (written warning).

22 ¹⁴ Cummings ¶4; Gaynes ¶7. Ex. 7 (BSM Manual), at BL 989; Ex. 25 (Agent Manual), at BL 764.

Bankers

1 15. A number of Bankers' declarants acknowledge the control that ~~branch managers~~,
 2 ~~specifically Mr. Hawks~~, could and did exercise over agents' production measures, hours, and
 3 schedules.¹⁵

4 16. Bankers did not require agents to have any prior experience in sales or insurance.
 5 Layton Decl. ¶5; Cummings Decl. ¶11.

7 17. All agents generally incurred the same types of expenses and made the same
 8 types of investments for their work, including licensing fees, laptops, cell phones, vehicles,
 9 automobile insurance, gasoline, and office supplies. Glassburn Decl. ¶5; Graf Decl. ¶5.

10 18. Although many agents did not last more than a few months on the job, they were
 11 recruited with the promise of a long-term career and were held out to the public as "career"
 12 agents.¹⁶ And there appears to be no dispute that the work performed by the agents was an
 13 integral and permanent part of Bankers' insurance business.

CONCLUSIONS OF LAW

16 1. Washington law favors resolution of cases through class actions, when
 17 appropriate. The requirements of CR 23 are liberally construed toward this end. *Nelson v.*
 18 *Appleway Chevrolet, Inc.*, 160 Wash.2d 173, 157 P.3d 847 (2007). Often noted in favor of
 19 allowing certification is the "state policy favoring aggregation of small claims for purposes
 20 of efficiency, deterrence, and access to justice." *Scott v. Cingular Wireless*, 160 Wash.2d
 21 843, 851-52, 856-57, 161 P.3d 1000 (2007). Because a class is always subject to a later

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¹⁵ Fawaz Decl. ¶¶6-7; Kendrick Decl. ¶¶8-9; Dinoto Decl. ¶8; Labizon Decl. ¶¶7-8; Adado Decl. ¶5; Gans Decl.
 24 ¶¶8,10,11; Fox Decl. ¶9.

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¹⁶ Berger Decl. Ex. 4 ("Welcome New Agent" letter), Ex. 42 Inter-Office Correspondence to Albert Hawks from
 Christine David, Ex. 48 (Program Introduction Instructor Guide), Ex. 49 (Bankers Life Policy brochure), at BL
 3171, Ex. 50 (Bankers Life Policy brochure), at BL 3178, Ex. 51 (Agent Development Track); Berger Decl. ¶8 &
 Ex. 5 (quoting and submitting NASv training video); Mitchell Decl. ¶7; McCormick ¶4, Layton Decl. ¶6; Huggins
 Decl. ¶2; Graf Decl. ¶6; David Decl. ¶7; Crowner Decl. ¶5.

1 decertification, trial courts should err in favor of certification. *Moeller v. Farmers Insurance*
 2 *Co. of Wash.*, 155 Wash.App. 133, 148 (2010), *aff'd*, 173 Wash.2d 264 (2011). However, the
 3 trial court must conduct a rigorous analysis of each of the CR 23 requirements to determine
 4 whether a class action is appropriate in any particular case. *Miller v. Farmer Bros. Co.*, 115
 5 Wash.App. 815, 820, 64 P.3d 49 (2003).

6 2. In undertaking this review, the Court should not decide the merits of the case.
 7 However, it is important for the Court to assess class certification in light of the substantive
 8 law underlying plaintiffs' claims in order to determine whether the CR 23 requirements of
 9 commonality and predominance are met.

10 3. Here, the Washington Supreme Court has settled the question of the test to be
 11 applied under the MWA for determining whether workers are employees or independent
 12 contractors. In *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wash.2d 851, 281 P.3d
 13 289 (2012), the Court adopted the "economic dependence" test, which is more liberal and
 14 provides broader coverage of workers under the MWA than the "right to control" test used in
 15 some other jurisdictions.

16 4. The central question under the "economic dependence" test is whether the
 17 worker is economically dependent upon the alleged employer or is instead in business for
 18 himself or herself. *Anfinson*, 174 Wash.2d at 871. Relevant factors include:

- 22 (1) The degree of control exercised by the alleged employer;
- 23 (2) The extent of the relative investments of the worker and the alleged
 employer;
- 25 (3) The degree to which the worker's opportunity for profit or loss is determined
 by the alleged employer;

1 (4) The skill and initiative required in performing the job; and
 2 (5) The permanency of the relationship.

3 *Hopkins v. Cornerstone America*, 545 F.3d 338, 343 (5th Cir. 2008); *Anfinson*, 174 Wash.2d
 4 at 869.¹⁷

5 5. These factors are not exclusive, and the determination must be made based
 6 upon the circumstances of the whole activity. *Anfinson*, 174 Wash.2d at 870-71. Regarding
 7 the degree of control factor, “[c]ontrol is only significant when it shows an individual exerts
 8 such control over a meaningful part of the business that she stands as a separate economic
 9 entity.” *Hopkins*, 545 F.3d at 343.

10 6. With respect to class certification under CR 23, the Court must first determine
 11 whether the class is so numerous that joinder is impractical. CR 23(a)(1). There is a presumption
 12 that joinder is impractical when the class numbers 40 or more. *Pierce v. Novastar*, 238 F.R.D.
 13 624, 630 (W.D. Wash. 2006); *see also Miller v. Farmer Bros. Co.*, 115 Wn. App. at 821-22. As
 14 noted above, there are more than 1,000 agents in the proposed class. Joinder of this many
 15 potential class members is impractical, and the numerosity requirement is satisfied.

16 7. The commonality requirement of CR 23(a)(2) is satisfied if the claims of the
 17 putative class members arises out of a common course of conduct or a common nucleus of
 18 operative facts in relation to all class members. *Pellino v. Brink's Inc.*, 164 Wash.App. 668, 683,
 19 267 P.3d 383 (2011). The predominance requirement of CR 23(b)(3) is met where the common
 20 questions of law or fact predominate over questions affecting only individual class members.
 21 *Pellino*, 164 Wash.App. at 683 n.5. The analysis of predominance under CR 23(b)(3) is
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26 ¹⁷ The *Anfinson* Court also cited *Real v. Driscoll Strawber Assocs.*, 603 F.2d 748, 754 (9th Cir. 1979), which
 listed a sixth factor: “whether the service rendered is an integral part of the alleged employer’s business.”

1 "somewhat more stringent than the CR 23(a)(2) commonality but it involves a similar
 2 inquiry." *Miller v. Farmer Bros. Co.*, 115 Wn. App. at 825.

3 8. Here, common questions of fact and law predominate. As noted in the Findings
 4 of Fact above, all agents were classified by Bankers as independent contractors, signed the same
 5 Agent Contract and were paid according to the same commission schedule, which was controlled
 6 by Bankers. Bankers exerted a substantial degree of control over what products the agents could
 7 sell, as well as their training, prospecting, marketing, sales, and customer service methods.
 8 Bankers maintained office schedules and productivity measures that agents were expected to
 9 meet. When agents left Bankers, they did not take their customers with them, and agents did not
 10 establish their own commercial offices. Thus, there are significant common questions regarding
 11 the degree of control exercised by Bankers and the degree to which the agents' opportunity for
 12 profit or loss was determined by Bankers, two of the factors in the *Anfinson* test.
 13

14 9. In addition, there are numerous and predominant common questions of law
 15 and fact with respect to the other *Anfinson* factors, including whether any specialized skills
 16 were needed by agents to perform the job, the permanence of the working relationship, the
 17 relative investments of the agents and Bankers, and the centrality of the work to Bankers'
 18 business. Indeed, there appears to be little dispute that many of the facts applicable to these
 19 elements of the *Anfinson* test are common across the proposed class members, even though
 20 the parties may disagree about the conclusions to be drawn from those facts.
 21

22 10. Bankers points out differences among agents in the application of its policies
 23 regarding outside employment, work hours, training, use of telephone scripts and monitoring of
 24 sales practices, use of standard marketing products, and the like. Bankers argues that such
 25 variation in working conditions among the agents precludes a finding that common issues
 26

1 predominate. However, some variation in work experience is expected in an MWA claim, and a
 2 narrow interpretation of the predominance requirement "would contravene the clear policy in this
 3 state that CR 23 should be read liberally in the interest of judicial economy." *Miller v. Farmer*
 4 *Bros. Co.*, 115 Wash.App. at 827.
 5

6 11. The pivotal issue is whether a trier of fact – despite this variation among
 7 agents' freedom from company policies – could still find economic dependence, the test of
 8 employee status under *Anfinson*. The Court concludes that a trier of fact could do so. It was
 9 Bankers, not the agents, who determined whether an agent would be exempt from standard
 10 company policies. Whether, considering all the circumstances, the agents were or were not in
 11 business for themselves is a question that can be answered by the finder of fact on a classwide
 12 basis.
 13

14 12. Defendants also contend that the agents were exempt from the MWA as outside
 15 salespersons. This contention does not defeat class certification. There are common questions of
 16 fact, though disputed, whether agents were free to regulate their own work hours, which is a
 17 critical element of the outside sales exemption. See WAC 296-128-540; Department of Labor
 18 and Industries Administrative Policy ES.A.9.7 (June 4, 2005).

19 13. Representative claims are typical under CR 23(a)(3) if they are reasonably
 20 coextensive with those of absent class members. Typicality is satisfied if the claim arises
 21 from the same event or practice or course of conduct that gives rise to the claims of other
 22 class members, and if the representatives' claims are based on the same legal theory. *Pellino*,
 23 164 Wash. App. at 684.
 24

25 14. It is undisputed that plaintiffs Christine David and Rod Clure worked as
 26 agents for Bankers and, like all other members of the putative class, were classified by

1 Bankers as independent contractors. They allege that they were economically dependent on
 2 Bankers and were subject to the same company policies broadly applicable to the class
 3 discussed above. *See* David Decl.; Clure Decl. Their claims that they were not paid
 4 minimum wages or overtime under the MWA are the same as the claims asserted on behalf
 5 of all class members. Bankers has not identified any defenses uniquely applicable to these
 6 plaintiffs. Therefore, typicality is satisfied in this case.

8 15. CR 23(a)(4) also requires that the named plaintiffs will adequately represent the
 9 class. Courts generally consider two elements in determining whether adequacy of representation
 10 is met: (1) there must be no adversity of interest between the class representative and other class
 11 members; and (2) the attorneys for the class representative must be qualified to conduct the
 12 proposed litigation. *Paxton v. Union Nat. Bank*, 688 F.2d 552, 562-63 (8th Cir. 1982); *see also*
 13 *DeFunis v. Odegaard*, 84 Wash.2d 617, 622, 529 P.2d 438 (1974). Here, Bankers has identified
 14 no adversity of interest between the plaintiffs and the proposed class, and has not challenged the
 15 adequacy of plaintiffs' counsel. The Court also finds that plaintiffs' counsel is adequate, having
 16 represented numerous certified classes in litigation under the MWA and other Washington wage
 17 and hour laws in the past. *See* Berger Decl. ¶¶2-5.

19 16. The only challenge raised by Bankers to the adequacy of the proposed class
 20 representatives concerns Ms. David's current employment in China. However, Ms. David has
 21 testified that she will continue to be available to consult with class counsel even while employed
 22 in China, and that she will be present in the United States during the scheduled trial of this
 23 matter. David Dep. Tr. 35:5-24. Her situation is distinguishable from that of the proposed class
 24 representative in *Arabian v. Sony Electronics, Inc.*, 2007 WL 627977, *6 (S.D. Cal. 2007),
 25 cited by Bankers, who refused to attend trial in the United States. Finally, defendants offered no
 26

challenge to the adequacy of Mr. Clure, and the CR 23(a)(4) requirement is satisfied as long as one of the proposed representatives is adequate. For these reasons, the Court concludes that CR 23(a)(4) is satisfied here.

17. The superiority prong of CR 23(b)(3) focuses on “a comparison of available alternatives.” *Sitton v. State Farm Mutual Auto. Ins. Co.*, 116 Wash. App. 245, 256, 63 P.3d 198 (2003). A class action for the claims in this case is superior to the alternatives of individual lawsuits or joined plaintiffs. Alternatives would pose unnecessary costs to the judicial system with multiple lawsuits concerning the same legal issue and kinds of evidence concerning agents’ economic dependence on Bankers. In addition to judicial efficiency, class treatment of these claims promotes access to justice because litigation costs are prohibitive for most individuals, and some class members may be deterred from filing suit in their own names due to their ongoing work relationship with Bankers. For these reasons, the Court concludes that a class action “is superior to other available methods for the fair and efficient adjudication of the controversy.” CR 23(b)(3).

18. Notwithstanding the foregoing, the Court concludes that the CR 23 requirements are not met with respect to defendant Albert Hawks. Plaintiffs seek to certify a statewide class action, but Hawks did not manage three of Bankers' six offices. He had no relationship to agents working out of those offices, and those agents could not have been economically dependent on him. Therefore, the requirements of commonality, typicality, and *adequacy*, predominance are not met with respect to Mr. Hawks.

ORDER

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Court hereby ORDERS as follows:

1 1. Plaintiffs' motion for class certification is GRANTED as to defendant
2 Bankers Life and Casualty Company. The class is defined as:

3 All individuals who worked as agents for Bankers Life and Casualty
4 Company in the State of Washington at any time between June 16, 2008 and
5 December 2, 2013 and who were classified as independent contractors.

6 2. Plaintiffs' motion for class certification is DENIED as to defendant Albert
7 Hawks.

8 3. The parties shall confer and attempt to agree upon a Notice to Class Members
9 ("Notice") no later than January 3, 2014 [10 calendar days after the date of this Order].
10 If no agreement can be reached, each party shall submit to the Court a proposed Notice no
11 later than February 10, 2014 [7 calendar days after date stated in previous sentence];

12 4. After a Notice is approved, defendants' counsel shall provide to Class
13 Counsel, within ten (10) business days of the date of such Order, a complete and corrected
14 list of the putative class members with their last known addresses, telephone numbers and
15 social security numbers (such numbers shall only be used to identify correct addresses if
16 necessary). The social security numbers shall be kept confidential in conformity with the
17 Protective Order entered in this matter;

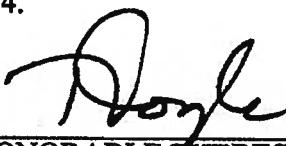
18 5. Class members shall have thirty (30) days from the date of the Notice within
19 which to return their exclusion requests advising counsel of their desire to opt-out of the
20 case;

21 6. Any class member who does not request exclusion may enter an appearance
22 through counsel; and

23 7. In the event any Notice is returned undeliverable, Class Counsel shall use
24 their best efforts to obtain corrected addresses. If corrected addresses are obtained, Class

1 Counsel shall re-mail the Notice promptly to the affected individuals, with exception that the
2 deadline for returning the exclusion forms shall be at least thirty (30) days after the date of
3 mailing.

4 DATED this 22 day of January, 2014.

5 
6 HONORABLE TERESA DOYLE
7

8 Presented by:

9 SCHROETER GOLDMARK & BENDER

10 
11 Adam J. Berger, WSBA #20714
12 Lindsay L. Halm, WSBA #37141
13 Counsel for Plaintiffs/Class Counsel

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[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER REGARDING PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION - 13

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EXHIBIT D

INTERROGATORIES

INTERROGATORY NO. 2: State the amount of damages sought by the Class in this case, and describe in detail how that amount is calculated.

RESPONSE TO INTERROGATORY NO. 1:

Plaintiffs are in the process of calculating these damages, which will be based on the average hours worked by Class Members during the Class Period and their income for the Class Period as reflected in the 1099s produced by Defendant. Back pay for overtime hours will be calculated according to the stand methodology described in RCW 49.46.130(1), Department of Labor and Industries Administrative Policy ES.A.8.2, and *Fiore v. PPG Industries, Inc.*, 169 Wn. App. 325, 344-47, 279 P.3d 972 (Div. I 2012). For weeks in which Class Members had no income or income less than the minimum wage per hour worked, Plaintiffs are also claiming back pay equal to the difference between earnings actually paid and the minimum wage. Plaintiffs will also calculate and claim prejudgment interest on all back pay amounts at 12% simple per annum from the week in which wages were due through the date of trial. Discovery is ongoing and this answer will be supplemented.

FIRST SUPPLEMENTAL ANSWER (MAY 19, 2014):

Plaintiffs provide the following supplemental response with respect to calculation of classwide damages for the period June 16, 2008 through December 31, 2011.

Dr. Jeffrey Munson has calculated damages on a week-by-week basis for 478 class members who responded to an hours-worked survey based on their responses and 1099 data produced by defendant. His data, methodology, assumptions, and calculations have been

1 previously provided. His calculation of damages based on the low end of the survey response
 2 ranges are \$2,176,583 for straight time damages (up to 40 hours in a week, where minimum
 3 wage was not paid) and overtime damages of \$6,418,600. At the high end of the survey response
 4 ranges, the straight time damages are \$2,228,658 and overtime damages are \$9,963,796. The
 5 averages of the low and high values are \$2,202,620 and \$8,191,198 for straight time and
 6 overtime respectively, or a total of \$10,393,818.

7 There are 375 class members during the relevant period who did not respond to the
 8 survey but for whom 1099 data were provided. From the class list hire and termination dates,
 9 these class members worked a total of 12,482 weeks during the relevant time period, compared
 10 to 20,316 weeks for the 478 survey responders. They earned a total of \$7,137,059.61, compared
 11 to a total of \$15,778198.19 for the survey responders. Dividing total earnings by total weeks for
 12 the two groups yields average weekly earnings of \$571.79 for the nonresponders and \$776.64 for
 13 the survey responders, which in turn yields a ratio of .736. The average damages of \$10,393,818
 14 for the survey responders, divided by their total eligible weeks (20,316), yields an average
 15 damage per week of \$511.61. Multiplying this figure by the average weekly earnings ratio of
 16 .736 for the nonresponders, then by the total eligible weeks of the nonresponders (12,482), yields
 17 estimated damages of \$4,700,034 for this group of class members.

20 48 class members responded to the survey, but have no payroll data. These individuals
 21 reported an overall non-weighted average of 48.44 hours worked per week, slightly lower than
 22 the overall average of about 49.925 for the 478 survey responders with payroll data. According
 23 to the class list, this group worked a total of 1,614 weeks during the relevant period. In addition,

1 there were 77 class members who did not respond to the survey and who are missing payroll
2 data, with total eligible weeks of 2,684 from the class list. Assuming that the absence of payroll
3 data reflects zero earnings during the relevant time period, damages can be conservatively
4 estimated using the average work hours reported by the 48 responders (48.44), the minimum
5 wage for 2009 and 2010 (\$8.55) and the total number of eligible weeks (4,298), yielding straight
6 time damages of \$1,469,916 (4,298 weeks * 40 hours/week * \$8.55/hour) and overtime damages
7 of \$465,228 (4,298 * 8.44 * \$8.55 * 1.5), or a total of \$1,835,144.
8

9 In sum, using the average of the low and high values calculated by Dr. Munson and the
10 above extrapolations, the total class damages for the June 16, 2008 through December 31, 2011
11 time period are estimated at \$16,928,996 (\$10,393,818 + \$4,700,034 + \$1,835,144).

12 Discovery is ongoing and this answer may be supplemented.
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